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Supreme Court of the United States

OCTOBER, 1949, TERM

No. 752

FLOYD W. DUNAWAY, ALLIE MERLE DUNAWAY, joined by her husband, FLOYD W. DUNAWAY, MATTIE V. DUNAWAY, a feme sole, JOHNNIE FAY DUNAWAY SMITH, joined by her husband, CLARENCE R. SMITH, JULIA DUNAWAY IRICK, joined by her husband, J. T. IRICK, NELLIE DUNAWAY GROGAN, joined by her husband, GEORGE B. GROGAN, MAMIE DUNAWAY CUNDIFF, joined by her husband, E. J. CUNDIFF, MARY FRANCES DUNAWAY IRWIN, joined by her husband, EARL R. IRWIN, RUBY DUNAWAY WRIGHT, a feme sole, *Petitioners*,

v.

STANDARD OIL COMPANY (New Jersey), CITIES SERVICE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, COLORADO INTERSTATE GAS COMPANY, SOUTHWESTERN DEVELOPMENT COMPANY, *Respondents.*

REPLY OF RESPONDENT, COLORADO INTERSTATE GAS COMPANY, TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

REPLY OF RESPONDENT, COLORADO INTERSTATE GAS COMPANY, TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Respondent, Colorado Interstate Gas Company, for reply to the petition for writ of certiorari shows the following:

STATEMENT OF MATTER INVOLVED

The question before the court is whether the United States Court of Appeals for the Fifth Circuit had jurisdiction to entertain an appeal from orders of the District Court quashing service of process on and dismissing five of six defendants who were alleged to be individually and jointly liable; the suit was left pending as to the sixth defendant. On motion of this respondent the appeal from the order quashing service of process upon it was dismissed. (R. 383.)

In support of the order of the Court of Appeals dismissing the appeal, this respondent urges the following point:

POINT

The appeal was properly dismissed because the orders of the District Court, from which the appeal was taken, adjudicated less than all of the claims, consequently under Rule 54(b) of the Federal Rules of Civil Procedure they did not adjudicate any of Petitioners' claims. The orders were not final decisions and were therefore not appealable under Sections 1291 and 1292, Title 28, of the United States Code.

STATEMENT OF THE CASE

Claiming violation of the Sherman and Clayton Acts, Petitioners brought suit in the United States District Court for the Northern District of Texas against six corporate defendants. The defendants were alleged to be individually and jointly liable to Petitioners in damages for breach of

an implied covenant of an oil and gas lease to protect against drainage. Service of process on Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Colorado Interstate Gas Company, and Southwestern Development Company was quashed and those defendants were dismissed. The remaining defendant, Canadian River Gas Company, was admittedly properly served and the suit against it remains pending in the District Court.

STATUTES AND RULES INVOLVED

Title 28, U. S. Code

Section 1291:

> The Court of Appeals shall have jurisdiction of appeals from all Final Decisions of the district courts of the United States, the district court of the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, except where direct review may be had in the Supreme Court.

Section 1292:

> The Court of Appeals shall have jurisdiction over appeals from, (1) Interlocutory orders of the District Courts of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, or of the judges thereof, granting, continuing, modifying, reviewing or dissolving injunctions, except where direct review may be had in the Supreme Court; (2) Interlocutory orders appointing receiver or refusing orders to wind up receivership, or to take steps to accomplish the purpose thereof, such as directing sales or other disposals of property; and (3) Interlocutory decrees of such dis-

trict courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed; and (4) judgments in civil action for patent infringement which are final except for accounting.

Federal Rules of Civil Procedure

Rule 54:

(a) *Definition; Form.* "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) *Judgment Upon Multiple Claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

ARGUMENT

Petitioners' claim is grounded upon alleged drainage of natural gas from beneath their land in the Panhandle of Texas. The land is under oil and gas lease to Canadian River Gas Company; the petitioners sue for alleged damages for breach of an implied covenant of the oil and gas lease to protect against drainage. (Paragraphs III, IV, V

and VI of the Complaint, R. 5-9.) Canadian River Gas Company is a party to the suit. (R. 5.) Standard Oil Company (New Jersey), Cities Service Company, Natural Gas Pipeline Company of America, Colorado Interstate Gas Company and Southwestern Development Company were made parties on the theory that asserted contractual relations among them and Canadian River Company made such defendants the real parties at interest and constituted a violation of the Sherman and Clayton Acts. [Paragraph I, (R. 3), and Paragraphs VII to XVI, inclusive, (R. 10-32), of the Complaint.] Petitioners' contentions are summarized in the prayer of their Complaint as follows:

"WHEREFORE, plaintiffs demand judgment:

"(1) That defendant lessee or lessees, ever since plaintiffs' wells were brought in, have failed to protect all of plaintiffs' leases from drainage of gas in continuous substantial amounts and in fact lessee or lessees (defendants) themselves being the ones that have siphoned from underneath plaintiffs' leases gas in a total amount of 26,300,000 M. C. F.

"(2) That the Canadian River Gas Company and the Colorado Interstate Gas Company and Southwestern Development Company are alter egos, instrumentalties of Standard Oil of New Jersey.

"(3) That Standard Oil Company of New Jersey and Cities Service are and have always been plaintiffs' lessees.

"(4) That Natural Gas Pipeline Company of America and the Public Service Company of Colorado and Colorado-Wyoming Gas Company are alter egos and instrumentalities of Cities Service Company.

"(5) That the defendants, Standard Oil, Cities Service and Southwestern Development Company, on April 5, 1927, entered into an unlawful conspiracy to

monopolize the natural gas business in the ownership of a large natural gas reserve in the Panhandle district of Texas, to control its production, transportation and sale throughout the north central states, and to lessen competition, control prices and production in interstate commerce, all in violation of the anti-trust laws of the United States and of Texas and other states.

"(6) That the overt acts of the defendants in pursuance of their unlawful conspiracy resulted in financial damages to plaintiffs as herein before related in the sum of $920,000.00.

"(7) That judgment be awarded in favor of plaintiffs against each of the defendants, individually and jointly, for thrice the amount of such damages, and for court costs and reasonable attorney's fees." (R. 33.)

It thus appears that joint and several liability is being asserted against all six of the corporate defendants, including Canadian River Gas Company. Five of these defendants, Canadian River Gas Company being the only exception, made motions to quash the service of process. (R. 179-211.) These motions were sustained (R. 324-328) and from the orders sustaining them an appeal was taken. (R. 335-7.)

In their "Designation of Record" filed in the District Court the Respondents call attention to the fact that no appeal is being taken as to defendant, Canadian River Gas Company, which "has been and still is licensed to do business in Texas and admits that it has been duly served with process." (R. 349.)

From this statement of the record it is apparent: (1) that although more than one claim for relief is presented in the action, so far as the drainage feature of the case is concerned, there is but one cause of action; (2) that in its orders quashing the service the District Court did not direct the entry of a final judgment upon any of the claims; (3) that less than all of the claims having been adjudicated, the action is not terminated as to any of the claims and the orders are subject to revision at any time before the entry of judgment adjudicating all of the claims. *Rule 54(b), Federal Rules of Civil Procedure.* Under these circumstances the orders are not final decisions. Not being final decisions, they are not appealable under *Secs. 1291 and 1292 of Title 28 of the United States Code.*

One of the leading cases having to do with premature appeals is *Hohorst v. The Hamburg-American Packet Company, 148 U. S. 261, 263, 13 S. Ct. 590, 37 L. Ed. 443.* In that case several defendants were sued for patent infringement. The Packet Company demurred to the complaint on the ground that the causes of action against the several defendants were distinct and hence the bill of complaint was multifarious. The complainant was given leave to amend; this he did by inserting the word "jointly" in the allegations of the defendants' infringement and by alleging that the individual defendants were partners and agents and managers of the Packet Company's business, that the infringements were committed in the prosecution of the business and that all of the defendants coöperated and participated in the infringements. The Packet Com-

pany was then allowed to enter a special appearance in the nature of a motion to dismiss the complaint as to it because of lack of jurisdiction over its person. The motion was granted, the bill of complaint was dismissed as to the Packet Company and the complainant appealed. In dismissing the appeal the court says:

> "So far as appears from the record, the suit is still pending and undetermined as against the co-defendants of the company. We are of the opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree."

In the more recent case of *Arnold v. United States for Use of W. B. Guimarin & Company, 263 U. S. 427, 434, 44 S. Ct. 144, 147, 68 L. Ed. 371*, the court says:

> "It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must not only be final, but complete, that is, final not only as to all parties, but as to the whole subject-matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction."

The Fifth Circuit has followed the holding that an order, judgment, or decree dismissing one defendant and leaving for the future disposition of the court the same controversy as to others charged to be jointly liable with him is not appealable.

In *Hunteman v. New Orleans Public Service (C. C. A. 5-1941), 119 F. 2d 465, Cert. Den., 314 U. S. 647, 86 L. Ed. 519*, one alleged joint tort-feasor was dismissed on the

ground that the complaint failed to state a cause of action as against it. The plaintiff appealed from the order of dismissal and was met in the Court of Appeals with a motion to dismiss on the ground that the judgment appealed from was not a final judgment. In granting the motion the court said:

> "The question thus posed, whether this court has jurisdiction to entertain the appeal, must be answered in the negative upon the authority of Menge v. Warriner, 5 Cir., 120 F. 816, General Electric Co. v. Allis-Chalmers Co., 3 Cir., 194 F. 413, and Hohorst v. Hamburg-American Packet Co., 148 U. S. 262, 13 S. Ct. 590, 37 L. Ed. 443. An order, judgment, or decree dismissing one defendant and leaving for the future disposition of the court, the same controversy as to others who are charged to be jointly liable with him, is not a final decision which will support an appeal to this court under Section 128 of the Judicial Code, as amended. 28 U. S. C. A. Sec. 225, 43 Stat. 936. When a final decree is rendered which determines the rights of all the parties to the controversy, and which, upon affirmance would leave nothing to be done by the court below except to execute the decree, then, and not before, may an appeal properly be taken.
>
> "These principles do not conflict with the letter or spirit of the Federal Rules of Civil Procedure. The Rules are not intended to affect the jurisdiction of the district courts with whose procedure they deal; they do not affect the jurisdiction of the appellate courts to which they are not directed. By seeking a judgment in solido against several defendants charged to be jointly and concurrently negligent, we think appellant presented but one claim for determination between the parties. When a judgment is entered which puts an end to that controversy between all of the parties litigant, appellate jurisdiction may be invoked."

Although the case was decided prior to the amendment of Rule 54(b) giving it its present form, the Advisory Committee's Report contained in the note to the amended rule as it appears in *5 F. R. D. 472* indicates that it was the intention of the Committee to reinstate the rule followed in the *Hunteman Case.* In its report the Committee says:

> "After extended consideration, it (was) concluded that a retention of the older federal rule was desirable, and that this rule needed only the exercise of a discretionary power to afford a remedy in the infrequent harsh case to provide a simple, definite, workable rule. This is afforded by amended Rule 54(b). It reëstablishes an ancient policy with clarity and precision."

In the note the Committee cites the case of *Markham v. Kasper (C. C. A.-7-1945), 152 F. 2d 270.* The *Markham Case* cites the *Hunteman Case* and is directly in point on the effect of quashing service. In that case it is said:

> "The order of January 5, 1945, is also not appealable. It merely quashed service of summons as to one defendant, but left the rights of the other parties unaffected. It has been held that the dismissal of one defendant from a proceeding, leaving the same controversy as to others jointly charged with him for future disposition by the Court, is not an appealable order. Hunteman v. New Orleans Public Service, et al., 5 Cir. 119 F. 2d 465, and cases there cited. We think the same is true of the quashing of summons as to one."

Later cases citing the *Hunteman Case* are *Photometric Products Corporation v. Radtke (C. C. A.-2-1946), 157 F. 2d 849* and *United States v. Braunstein (C. C. A.-2-1948), 168 F. 2d 749.*

Under the authorities cited, the Court of Appeals correctly held the order quashing the service of process as to the appellee, Colorado Interstate Gas Company, was not one from which an appeal could be taken. But Petitioners contend that these authorities and those cited by the Court of Appeals are not applicable.

Petitioners make the point that neither the *Hunteman Case* nor the others cited by the Court of Appeals involved claims of joint and several liability but were restricted to claims of joint liability only. In this Petitioners are mistaken. Suit in the *Hunteman Case* was against three defendants, the plaintiffs' petition "alleging that the injury resulted from their (the defendants) joint and concurrent negligence, and asking judgment in solido against them." Petitioners have failed to take into consideration the meaning of the term "*in solido*". It is a term from the civil law and is synonymous with "joint and several". *Rusca and Cunningham v. Hammet, 195 So. 642, 643; George T. Bishop, Inc. v. Jones, 17 La. App. 136 So. 101; Liverpool, Brazil and River Platte Navigation Co. v. Agar and Le-Long (E. D. La.-1882), 14 F. 615.*

There is another reason why Petitioners' assertion that the *Hunteman Case* did not involve joint and several liability is mistaken. Under the Louisiana law contributing tort feasors are jointly and severally liable for the damages caused by their concurrent wrongful acts. *Roppolo v. Pick, 4 So. 2d 839.*

In *Hohorst v. The Hamburg American Packet Company, 148 U. S. 261, 13 Sup. Ct. 590, 37 L. Ed. 443*, the basic au-

thority relied upon by the Court of Appeals in the *Hunteman Case*, the complainant was asserting joint and several liability against the defendants. Complainant first sued the defendants severally, then amended the complaint by adding a claim of joint liability.

In *Western Contracting Corporation, et al. v. National Surety Corporation (C. C. A.-4-1947), 163 F. 2d 456*, cited by the Court of Appeals, a subcontractor brought an action against the general contractors, a joint venture, to recover damages for breach of contract. The contract was performable in West Virginia and the suit was instituted in the United States District Court for the Northern District of that State. In West Virginia the rights, obligations and duties of joint venturers are similar to those obtaining among partners. *Kaufman v. Catzen, 81 W. Va. 1, 94 S. E. 388, L. R. A. 1918 B 672.* And under the law of that state the liability of partners upon contractual obligations is joint and several. *Roberts v. Toney, 100 W. Va. 688, 131 S. E. 552; Weimer v. Rector, 43 W. Va. 735, 28 S. E. 716; Courson v. Parker, 39 W. Va. 521, 20 S. E. 583.* So we have another case in which the liability asserted was joint and several and not merely joint.

In *Lockhart v. New York Life Insurance Company (C. C. A.-4-1934), 71 F. 2d 68*, also cited by the Court of Appeals, a cause of action was alleged against the insurance company on policies of insurance; in addition, there were allegations of fact with reference to the conduct of a local agent named Dickinson and an averment that he as well as the company was indebted to plaintiff on the policies. Clearly joint and several liability was there asserted.

It is submitted that Petitioners have failed to show the commission of any error by the Court of Appeals.

CONCLUSION

This Respondent urges that the petition for writ of certiorari be denied.

Respectfully submitted,

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.....

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I, WM. Q. BOYCE, attorney for the Respondent, Colorado Interstate Gas Company, do certify that a copy of the foregoing brief was mailed to Arthur H. Bartelt, P. O. Box 190, Austin, Texas, attorney for Petitioners, in a properly stamped and addressed envelope, this the ..... day of May, 1950.

.....